Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-1233

SUPER ATHLETICS CORPORATION,

S. DAVID BRODSKY & DONALD E. PINCHOCK,

Petitioners

v.

UNIVERSAL ATHLETIC SALES COMPANY,

Respondent

PETITIONERS' BRIEF UNDER RULE 24-4 IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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I - INTRODUCTION

The arguments first raised in Respondent's Brief in Opposition relate to the following subjects:

1. Assessment of patented subject matter on the basis of the accused apparatus (B3 Fn4, Pet. 3, App. 50, PTX-108).

2. Zinkin patent directed to a combination of old elements (B6, Pet. 2, 11).

3. Scope and Content of Prior Art (B7).

4. Labelling of Exhibits (B8, App. 51, 52, 53).

II - ARGUMENT

1. Assessment of Patented Subject Matter on Basis of Accused Apparatus.

The use of the accused apparatus (App. 50) in assessing the validity of Zinkin patent is most appropriate. The apparatus which Respondent accuses of infringing the patent is a measure created by Respondent itself, of the validity of the Zinkin invention. By Respondent's own admission the accused apparatus is an embodiment of the Zinkin patent and based on the apparatus the validity of the patent should be assessed. Respondent should not be permitted to blow hot and cold; to insist that the evaluation of validity of the Zinkin patent should be based on the box structure and the three levers and determination of infringement on a simple structure with one lever (App. 50) so described by the trial court (App. 26).

2. Zinkin Patent Directed to a Combination of Old Elements.

Whether or not a patent is directed to a combination of old elements is a matter of fact and does not depend on

the use of the word combination. Zinkin patent is manifestly directed to a combination of old elements: the lever for muscle development taught by Simmons (App. 52, 53) and the table used by Zinkin with barbells (App. 3, App. 25).

The fact is that the trial court, in quoting from the decisions of this Court, recognizes that a combination is involved. From the A & P case, it quotes (App. 30):

> "Courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements.
>
> * * * * *
>
> "A patent for a combination which only unites old elements with no change in their respective functions, such as is presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men." (emphasis added)

From Black Rock (App. 31), it quotes:

> "We conclude that while the combination of old elements performed a useful function, it added nothing to the nature and quality of the radiant-heat burner already patented. We conclude further that to those skilled in the art the use of old elements in combination was not an invention by the obvious-nonobvious standard." (emphasis added)

The trial court adds (App. 36):

> "Our opinion does not change when we consider the patent as a whole, rather than as a combination of several small changes. The plaintiff has created a useful machine, but one with no surprise, the sum of whose parts are no greater than its

> individual components. The Zinkin machine is one about which the Supreme Court might say, as it did in A & P 'Two and two have been added together, and still they make only four.' 340 US at 152, 95 L Ed at 157." (emphasis added)

3. Scope and Content of Prior Art

The trial court did, in fact, consider the scope and content of the prior art in great detail (App. 33-35). Petitioners' expert, Firmn Lyle, is mentioned only once (App. 36) where the trial court said:

> "The record does, however, contain opinions by both parties' experts as to obviousness. The court chooses to adopt the view of defendant's expert Firman Lyle."

It was the trial court's prerogative, after hearing and observing the contradictory witnesses, to select one to believe. Having been a patent examiner for 7 years and a patent attorney for Westinghouse for 35 years, Lyle was manifestly well qualified to testify as to obviousness with Zinkin's teaching and the teachings of the references before him.

4. Labelling of Exhibits

As stated in the Petition (Pet. 3), Respondent's Exhibit, PTX-108, is labelled "for the convenience of this Court". The labelling on the other exhibits is likewise for the convenience of this Court. By a request addressed

to the Clerk of the United States Court of Appeals for the Third Circuit and filed concurrently with the Petition, the Court of Appeals has been asked to certify Exhibits PTX-108 (App. 50), DX-8 (App. 51), DX-3 (App. 52, 53) and DX-7 (App. 54) together with Zinkin patent to this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of each of the foregoing Reply have this date been served upon opposing counsel of record by mailing the same by United States Mail, postage prepaid and properly addressed.

Date:

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